IN THE

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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1214

IOWA BEEF PROCESSORS, INC., et al.,
Petitioners,

vs.

MEAT PRICE INVESTIGATORS ASS'N.,
DARRELL CAMERON, and DON LUDVIGSON, et al.,
Respondents.

SUPPLEMENT TO JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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This Supplemental Brief to the Joint Brief in opposition to the Petition for Writ, raises two matters inadvertently omitted from or not adequately explained in the joint brief, but of great importance to the Plaintiff-Respondents in the three cases.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING IBP'S LEAVE TO AMEND TO ASSERT A CROSS-CLAIM FOR CONTRIBUTION AGAINST SPENCER FOODS.

Over two years after *Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc., et al.*, was filed, and two months after it learned of Spencer's intent to settle with the Plaintiffs, IBP filed its Motion to Amend to assert a 1-paragraph purported cross-claim for contribution against Spencer. By this time, notice had been sent to the 54,804 absent class members, and the hearing on final approval of the settlement was only four days away. Although it had previously been IBP's position that there were 1,665 federally inspected cattle slaughterers who were indispensable parties to one of the suits (5th Cir. Supp. APP. page 842), IBP chose to assert its contribution cross-claim against only the settling defendant, Spencer Foods. IBP gave no reason, in its Motion, why Spencer Foods might be liable for contribution, whereas, apparently no other named or unnamed packer defendant would be.

Prior to the ruling disallowing the amendment, the following exchange took place at the August 11, 1978 settlement hearing before the Trial Court (Mr. Hawkins is attorney for the Plaintiff; Mr. Heubaum is General Counsel for IBP):

> "Mr. Hawkins: What facts did you have to make that statement on contribution? What facts did you have that Spencer was involved in any way with you so that you could file a contribution action against them? What facts in your knowledge at the time you made the statement did you have?

Mr. Heubaum: Are you addressing yourself to the facts which would constitute a violation of the antitrust laws of the nature alleged in the Complaint?

Mr. Hawkins: That's right.

Mr. Heubaum: None whatsoever."

(August 11, 1978, Tr. P. 63). IBP is asking this Court to rule that it should be allowed to interject a cross-claim in the complicated proceedings below, despite the fact IBP has told the Trial Court it has no facts to support such a claim. On this basis alone, this Court should deny the right to review the denial of the contribution amendment. There is no case or controversy between the parties.

IBP's purported cross-claim against Spencer Foods is one paragraph:

"Iowa Beef Processors, Inc., while denying any liability to Plaintiffs in the above cases, hereby asserts a claim of contribution against its co-defendant, Spencer Foods, Inc., as and to the extent that IBP should ultimately be required to pay to any of the Plaintiffs an amount which is more than its proportionate share of any liability asserted against the defendants, jointly and severally."

Even if there were such a thing as having a claim for contribution under the Sherman Act, this pleading does not comply with even the simple requirements of *Federal Rule of Civil Procedure* 8(a). It does not state why Spencer would be liable to the Plaintiffs, it does not state to the Court what share of the damages would be Spencer's share; and it does not even speak in terms of ultimate judgment against IBP. Rather, it talks in terms of "liability asserted against the defendant." One might wonder why IBP is attempting to assert

a right of contribution only against Spencer Foods at this time. The answer is simple. IBP wants to block the settlement between the Plaintiffs and Spencer Foods. In the hearing before the Trial Court on August 11, 1978, it was disclosed that General Counsel for IBP, Mr. Heubaum, had called General Counsel for Spencer Foods, C. William Eastwood, as soon as IBP learned of the settlement. Mr. Heubaum told Mr. Eastwood that IBP would do everything it could to keep Spencer in the litigation. (August 11, Tr. pp. 61-62, 75).

The allowance or disallowance of an amendment to a Complaint under Rule 15(a) *Fed. R. Civ. P.*, is a matter within the Trial Court's sound discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). If there is an apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment, futility of amendment, etc.—the Trial Court is within its discretion to deny the amendment. *Foman v. Davis*, 371 U.S. at 183.[1] Here, the amendment was asserted only to block the settlement, to the prejudice of Spencer (which desired to settle and end its involvement in the litigation), the Plaintiffs (who have expended money on the temporary class notice and who desire to simplify the lawsuit) and Land-O-Lakes (a farmers' cooperative which has purchased Spencers assets relying on the settlement). Prejudice to third parties may be considered in denying leave to amend. *Cooper v. American Employers' In-*

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[1] The Order Denying Motion of Defendant Iowa Beef Processors, Inc. To Amend Answer To Assert Crossclaim, dated September 1, 1978 is based in part on Defendant's conduct as is reflected by the Court's inclusion of the phrase ". . . and upon all the files, records and proceedings herein. . . ".

surance Co., 296 F.2d 303 (6th Cir. 1961). Considering IBP's delay in making the motion to amend, its admitted lack of factual basis for the contribution claim, and the prejudice to all other parties, the Trial Court was well within its discretion in denying leave to amend. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-401 (1971). *See, Generally* 3 J. Moore, *Moore's Federal Practice* ¶15.08 [4] (2d ed., 1979) C. Wright and A. Miller, *Federal Practice and Procedure* §1487-88 (1971).

II. RECUSAL IS NOT WARRANTED.

In the joint brief in oppositon, at page 16, there is a statement which might suggest that Plaintiffs believe Judge Taylor should recuse himself from ruling on the pending class determination motion. Plaintiffs disavow the suggestion that any recusal is appropriate. There is no reasonable basis for such a motion for recusal because the non-settling defendants have not been prejudiced on the merits of the Class Action Motion by the Spencer settlement proceedings. Judge Taylor has stated that the creation of a temporary settlement class does not have any bearing on his determination of the propriety of a litigation class (A6-7, 24-25). After the Spencer settlement was final, the non-settling defendants presented five full days of evidence on the class action issue before Judge Taylor, and the matter is fully briefed and under submission to Judge Taylor. At no time have defendants ever moved to

recuse Judge Taylor on grounds of prejudice as the result of the Spencer settlement proceedings.

Respectfully submitted,

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